

No. 11,990

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ESTELLA LATTA, JONES M. GRIFFIN and
ALWIN CHAMBERS,

Appellants,

VS.

WESTERN INVESTMENT COMPANY (a
corporation), et al.,

Appellees.

APPELLANTS' SUPPLEMENTAL BRIEF.

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Subject Index

	Page
Jurisdiction of the U. S. District Court	1
Comment: Fraud and other reasons giving court jurisdiction	1
Jurisdiction of the U. S. Court of Appeals	4
Errors	5
Issues on this appeal	5
Arguments	6

Table of Authorities Cited

Cases	Page
Baker v. Eastman, 206 Fed. 865	1
Baker v. Superior Court, 43 Cal. App. 221	2
Gains v. Fueutel, 92 U. S. 1010	2
Griffin v. Cody, 113 U. S. 89	2
Markham, Alien Property Custodian v. Allen, 156 Fed. (2d) 653	1
Mfg. Co. v. Cotton Mills, 184 U. S. 290	1
Murphy v. Crawley, 140 Cal. 145	2
Southern Pacific R.R. v. Willett, 14 Pac. (2d) 526.....	4
Sutten v. English, 246 U. S. 199	2

Statutes

California Code of Civil Procedure, Section 963	5
Judicial Code, Volume 28, Section 225	5
United States Statutes at Large, 51st Congress, Chapter 517, page 826	5

Rules

U. S. Rule 12	5
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Appellees.

APPELLANTS' SUPPLEMENTAL BRIEF.

JURISDICTION OF THE U. S. DISTRICT COURT.

This is a suit of a civil nature in equity for declaratory relief.

Transcript of Record, Para. 10, page 5.

1. *The matters in controversy exceed, exclusive of interest and cost, the value of \$3000.00.*

2. *Diversity of citizenship.*

Transcript of Record, Para. 2, page 3.

Comment: Fraud and other reasons giving court jurisdiction.

Mfg. Co. v. Cotton Mills, 184 U. S. 290;

Baker v. Eastman, 206 Fed. 865;

Markham, Alien Property Custodian v. Allen,
156 Fed. (2d) 653.

3. *Fraud.*

“While the case was open and pending, the Probate Court had exclusive jurisdiction of all matters of accounting by administrator. But when time had expired and no appeal could be had, the powers of the equity court were at once available if the decree had been fraudulently obtained.”

Baker v. Superior Court, 43 Cal. App. 221 at 224.

“Where the court of equity has jurisdiction over any phase of the case, it will exercise jurisdiction over all phases.”

Murphy v. Crawley, 140 Cal. at 145.

4. *Property withheld from the court.*

“Where property was withheld from the court, a court of equity will exercise jurisdiction over it.”

Griffin v. Cody, 113 U. S. 89;

Transcript of Record, Para. 19, Sub. Secs. “f”, “g”, pages 11 to 15, inclusive.

“Where state Courts have laws permitting suits in equity, the Federal Courts have concurrent jurisdiction especially where there is fraud or concealment of facts.”

Gains v. Fuentel, 92 U. S. 1010;

Sutten v. English, 246 U. S. 199.

5. *Real property withheld from the court.*

Transcript of Record, Exhibit “B”, page 53 et seq.

Deed of Samuel F. Hopkins and Moses Hopkins to Mary Frances Hopkins, dated March 30, 1880, she

then being administratrix, Transcript of Record, Para. 25, page 23.

a. Deed void for lack of description of real estate.

b. Deed purporting to convey property to Mary Frances Hopkins while she was acting in a fiduciary capacity, was a breach of trust and a fraud upon the heirs.

Transcript of Record, Exhibit "C", page 55
et seq.

a. This deed was executed April 5, 1879, by Mary Frances Sherwood-Hopkins et al. to Collis P. Huntington et al. without an order or confirmation of the court and during the purported administration of Mary Frances Sherwood-Hopkins and signed individually by her.

b. This deed attempted to convey real estate, particularly described, and which Mark Hopkins either owned or in which he had an interest; and also attempted to settle and convey the interest held by Mark Hopkins in a copartnership.

Transcript of Record, Para. 24, page 22.

c. This deed was signed by Mary Frances Sherwood-Hopkins, individually and not in her purported capacity as administratrix.

Transcript of Record, Exhibit "D", page 61
et seq.

This deed as of date January 16, 1880, attempted to convey to Ione Coal and Iron Company real estate therein described in which Mark Hopkins had a one-fifth interest.

a. This purported conveyance was without order or confirmation of the Probate Court as shown on the face of the deed.

b. M. F. Sherwood-Hopkins signed individually and not in her fiduciary capacity as administratrix and this purported conveyance was a fraud on the court and upon the heirs of Mark Hopkins.

In the Fourth Cause of Action, Transcript of Record, page 40 et seq., and in the Fifth Cause of Action, Transcript of Record, page 43 et seq., the plaintiffs allege that Mark Hopkins at the time of his death owned an interest in the Southern Pacific Company and the Central Pacific Railway Company, and that if said decedents have transferred, assigned or liquidated said interests it was done without the knowledge, consent, or authority of the plaintiffs or their ancestors and without authority of law, and is a fraud upon the court and upon the plaintiffs and their ancestors.

JURISDICTION OF THE U. S. COURT OF APPEALS.

The order of the District Court granting motion to dismiss is a final order or judgment.

Transcript of Record, pages 196 to 198.

Southern Pacific R.R. v. Willett, 14 Pac. (2d) 526.

In this case the court said the rule is well established in this state from a very early period that a

minute order of the trial court dismissing an action is a final judgment.

California Code of Civil Procedure, Sec. 963.

“The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions in the district court in all cases save where a direct review may be had in the Supreme Court.”

Judicial Code, Vol. 28, Sec. 225.

The United States Statutes at Large, 51st Congress, Chapter 517, page 826, was an act to establish the Circuit Courts of Appeals, giving them power to review final judgments and orders of the District Courts.

ERRORS.

1. The District Court erred in admitting affidavit of Handlos. (Appellants' Brief, page 6.)

2. The District Court erred in admitting affidavits and exhibits on motion.

a. Amendment to U. S. Rule 12 not then in effect. (Appellants' Brief, page 7.)

b. The order of dismissal based upon affidavits and exhibits admitted by the District Court was erroneous.

ISSUES ON THIS APPEAL.

1. The complaint alleges facts which negative laches.

2. Laches do not apply to void instruments.
3. Laches do not apply to a Decree of Distribution granted by the court in excess of its jurisdiction.
4. Laches do not run against extrinsic fraud upon the court and the interested parties, prior to the full discovery of the facts.

ARGUMENTS.

1. Does the complaint allege facts which negative laches?

a. Appellants contend that it does.

The Honorable U. S. District Court finds that it does not. In this finding the court erred. The order of dismissal is not supported by the facts alleged in the complaint.

Appellants' Brief, pages 1, 2, 3; Transcript of Record, Paras. 21, 22, 23, page 20 et seq.; also Para. 29, pages 25 and 26.

b. The District Court erred in its findings that averments of fraud in the complaint constituted INTRINSIC FRAUD.

The fraud alleged by plaintiffs is *extrinsic* in its nature. The plaintiffs do not predicate their cause of action upon *intrinsic* fraud. (Transcript of Record, Para. 19, Sub. Secs. F and G, pages 9 to 15, inc.; also Sub. Sec. M, pages 18 to 20, inc.)

The appellants contend that there were no matters finally determined by the purported Decree of Distribution of the Probate Court.

Transcript of Record, Para. 14, page 6 et seq;
 Paras. 17, 18 et seq., page 8 et seq.; Para.
 19, page 9 et seq.;
 Appellants' Brief, pages 35 to 41, inc.

2. Laches do not apply to void instruments.

a. The complaint raises the issue as to the Decree of Distribution and certain deeds being void.

Appellants' Brief, pages 13 to 15, inc.; pages
 42 to 45, inc.; pages 48 to 50, inc.

b. This issue must be squarely met and finally determined by the court.

c. The order of dismissal is *silent on these allegations* and by its order of dismissal, the court deprives the plaintiffs of their day in court.

d. In this the court not only erred but violated the constitutional rights of plaintiffs.

Transcript of Record, Para. 20, page 20;
 Appellants' Brief, pages 18 and 19.

e. The defense of laches is not available to void instruments.

Appellants' Brief, pages 32 to 34, inc.

3. Laches do not apply to a Decree of Distribution granted by the court in excess of its jurisdiction.

a. The complaint alleges that the court appointed as administrator one convicted of an infamous crime.

Appellants' Brief, pages 16 to 23, inc.

b. By reason of such appointment all proceedings thereunder, including the decree, are in excess of jurisdiction and are void.

c. Laches do not cure lack of jurisdiction of court.

d. The order and dismissal not only is silent on this issue, but in effect would determine as valid a Decree of Distribution granted by the Probate Court in excess of its jurisdiction and in violation of the statute of California and the statutes of North Carolina.

Appellants' Brief, page 16.

4. Do laches run against extrinsic fraud upon the court and the interested parties prior to the full discovery of the facts?

Appellants' Brief, pages 13 to 15, inc.

Dated, October 1, 1948.

Respectfully submitted,

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